UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

BARRY HALL, et al., Plaintiffs, vs. AT&T MOBILITY LLC f/k/a CINGULAR WIRELESS LLC *et al.*, Defendants.	Civil Action No. 07-05325 (JLL) **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY CERTAIN ETF COUNSEL FOR ORDER ENFORCING AGREEMENT WITH CLASS COUNSEL RE ALLOCATION AND DISTRIBUTION OF ATTORNEYS' FEES AND EXPENSES** Date: February 7, 2011 Time: 10:00 a.m. Before: Hon. Jose L. Linares

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I. INTRODUCTION

Class Counsel's refusal to pay the additional $199,691.01 they owe to the Seven Law Firms[1] is unjustified. The language of the agreement between the parties (the "Agreement") requires Class Counsel to pay "… $600,000.00 (Six Hundred Thousand Dollars) for attorneys' fees***, plus*** reimbursement of out-of-pocket costs and expenses incurred by the Seven Law Firms." Class Counsel were obligated to pay the Seven Law Firms $600,000.00 in attorneys' fees, plus Court-approved costs and expenses of $199,691.01 *in addition to*, and *on top of*, those fees.

Unrebutted extrinsic evidence also compels the conclusion that the Seven Law Firms are entitled to be paid fees of $600,000 plus expenses. Class Counsel and the Court interpreted virtually identical language in the Settlement Agreement, the Notice and Class Counsel's fee application to allow *Class Counsel* to recover attorneys' fees in a fixed amount *plus expenses*. Furthermore, in negotiating the Agreement, the parties discussed the issue in detail, and after requesting and receiving an estimate of the Seven Law Firms' expenses, Class Counsel agreed that the amount to paid to the Seven Law Firms would be "*$600,000 plus expenses*." Declaration of Alan R. Plutzik in Support of Motion to Enforce Agreement, filed January 14, 2011 (the "Plutzik Decl."), at ¶ 19. The Agreement was a written embodiment of that understanding.

When they wanted the Seven Law Firms to pay 10% of the cost of buying out an objector, Class Counsel argued that the $600,000.00 referenced in the Agreement constituted fees alone and *did not* include costs and expenses. That position is irreconcilable with Class Counsel's current position that the $600,000.00 referenced in the Agreement included not only attorneys' fees but also costs and expenses. Having taken one position to try to extract the maximum contribution from the Seven Law Firms to buy out the objector, Class Counsel are estopped to adopt a contrary interpretation of the Agreement now.

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[1] The Seven Law Firms are Bramson, Plutzik, Mahler & Birkhaeuser, LLP; Franklin & Franklin, APC; Law Offices of Anthony A. Ferrigno; Reich Radcliffe LLP; Cuneo Gilbert & LaDuca; Law Offices of Carl Hilliard; and Law Offices of Joshua Davis.

In sum, the Agreement and all the extrinsic evidence support the conclusion that Class Counsel owe the Seven Law Firms an additional $199,691.01. Class Counsel's protestations that they did not agree to pay that additional amount, or that it would not have been rational for them to do so, are contrary to the language of the Agreement, inconsistent with the evidence and unavailing as a matter of law. Class Counsel should be ordered to pay what they owe.

II. ARGUMENT

A. The Agreement Requires Class Counsel to Pay the Seven Law Firms an Additional $199,691.01

In interpreting a contract, the Court must determine the intentions of the parties, *as revealed by the language of the contract*. That is California law.[2] It is also New Jersey law:

> [C]ourts must consider the plain language of the contract and the parties' intent, as demonstrated by the purpose of the contract and any relevant surrounding circumstances. However, where the contract terms are clear and unambiguous, there is no room for interpretation and courts must enforce those terms as written.

Peterpaul v. Reger, 2007 U.S. Dist. LEXIS 94059 (D.N.J. 2007) (Linares, J.) (citations omitted).

Here, the Agreement's plain language provides that Class Counsel must pay the Seven Law Firms "$600,000.00 for attorneys' fees***, plus*** reimbursement of out-of-pocket costs and expenses incurred by the Seven Law Firms …" That language requires Class Counsel to pay the Seven Law firms $600,000.00 in attorneys' fees***, plus*** costs and expenses on top of those fees.

1. Under the Plain Language of the Agreement, the Seven Law Firms Are Entitled to Receive Attorneys' Fees of $600,000, *Plus* Reimbursement of Their Costs and Expenses

Class Counsel's contention that the Agreement only requires them to pay the Seven Law Firms a total of $600,000.00, which includes attorneys' fees, costs and expenses, is inconsistent with the plain language of the Agreement. Among other things, Class Counsel ignore the fact

[2] *Robert Nattress & Associates v. Cidco*, 184 Cal. App. 3d 55 (Cal. App. 1986). (The determination of the parties' intention is an objective inquiry that turns on what a reasonable person would expect the language of the contract to mean.).

that the clause providing for the payment of "$600,000.00 for attorneys' fees" and the clause providing for the reimbursement of the Seven Law Firms' "costs and expenses" are separated by (1) a comma, and (2) the word "plus." Throughout their brief, in an effort to mislead the Court, Class Counsel misquote or mis-paraphrase this portion of the agreement by leaving out the comma. *See, e.g.*, Class Counsel's Br. at 5, 8. In interpreting a contract, however, the Court must give effect to *every* provision thereof[3] – including the comma and the word "plus."

The comma after the phrase "attorneys' fees" in the Agreement signifies that the prior clause about attorneys' fees is complete in and of itself, and that the language following it deals with a separate subject – namely, costs and expenses. The word "plus" that follows the comma means that costs and expenses are *in addition to* the $600,000 in fees that Class Counsel owe. Class Counsel's brief does not even mention the comma.

The presence or absence of a comma can be decisive in contract interpretation. Thus, in *Balandran v. Labor Ready, Inc.* (2004) 124 Cal. App. 4th 1522, 1529, the Court held that because there was *no* comma separating two parts of a sentence, the subject addressed in the latter part of the sentence – "all other employment related issues" – was included in the category of issues that the first part of the same sentence provided were subject to arbitration. The Court pointed out that had the agreement included a comma before the phrase "all other employment issues," that would have denoted an intent to *divide* "other employment-related issues" from the arbitrable issues described earlier in the sentence. *Id.*

Here, a comma separates the clause requiring the payment of "the sum of $600,000 for attorneys' fees" from the clause that says "plus the reimbursement of costs and expenses incurred by the Seven Law Firms." The comma means that the subject matters of those two clauses are separate, and that the $600,000.00 does not encompass costs and expenses. The phrase "costs and expenses" does not modify, or relate back to, the phrase, "$600,000.00 for attorneys' fees."

[3] Each contract must be read as a whole, and effect must be given to every provision thereof, with each clause helping to interpret the other. Cal. Civil Code §§1641, 3541; *Strong v. Theis*,187 Cal.App.3d 913, 918 (1986). *See Newark Publishers' Association v. Newark Typographical Union*, 22 N.J. 419, 426 (1956)(same).

The comma makes clear that the Seven Law Firms are entitled to $600,000.00 in attorneys' fees, --- ***plus*** reimbursement of their costs and expenses.[4]

The word "plus" is also decisive. "Plus" means "in addition to"; "more by the addition of"; "with the addition of"; something additional; also; or furthermore. Opening Br. at 15.

In *Sand v. Greenberg*, 2010 U.S. Dist. LEXIS 1120 (N.D.N.Y. 2010), plaintiffs accepted a Rule 68 Offer to allow judgment to be taken against defendants in the amount of "$ 525,000, … inclusive of all damages, liquidated damages and/or interest plus reasonable attorneys' fees, costs and expenses …." Defendants argued that the Rule 68 Offer was for a total amount of $ 525,000, *inclusive* of attorneys' fees. The Court held, however, that the language of the Offer entitled plaintiffs to recover fees of $525,000, ***plus*** attorneys' fees and expenses. The Court observed that "[t]he word 'plus' starts a new phrase and a new train of thought … The word 'plus' clearly separates damages – which are included in the offer of $ 525,000 – from attorneys' fees, costs and expenses, which are not." *Id.* at *8-*9. The Court added, at *12-*13:

> …"[P]lus" means "in addition to;" "greater than specified;" "an added quantity;" or "increased by." Applying that definition, the contested sentence is interpreted to mean that the $ 525,000 includes the damages, liquidated damages and/or interest which Plaintiffs' claim on account of alleged violations of the Federal Fair Labor Standards Act and the New York State Labor Law. In addition to that amount, "plus" in other words, [are] reasonable attorneys' fees, costs and expenses actually incurred ….

Awards of a fixed amount of attorneys' fees "***plus costs***" have always been held to mean that fees are paid in the amount indicated, and costs are payable *in addition*. *See Estate of Baum*, 209 Cal. App. 3d 744, 749 (1989) (Order awarding "***$147,125 as reasonable attorney fees, plus costs and interest***" construed to mean "a fee of $ 147,125" – with "costs and interest" on top of that number); *In re Marriage of Ben-Yehoshua*, 91 Cal. App. 3d 259, 263, 269 (1979) ("$600 in attorneys' fees plus costs" construed to mean "$600 attorney's fees … and actual costs.")

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[4] *See United States Fid. & Guar. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 1997 U.S. Dist. LEXIS 1749 (S.D. Ala. 1997) ("… [T]he Court is not convinced that the phrase 'in connection with the performance by [the indemnitor] of this Agreement' modifies the aforementioned phrase whereby BE&K agreed to indemnify International Paper for all damages and liabilities to BE&K's employees. These two phrases are separate and set apart by commas.")

Class Counsel are therefore in error when they argue that the Agreement provides the Seven Law Firms with nothing more than a flat payment of $600,000.00. What the Agreement actually says is that Class Counsel will pay the Seven Law Firms $600,000.00 in attorneys' fees – [a comma marks an end to that thought] – and that in addition to that ("***plus***"), the Seven Law Firms are entitled to reimbursement of their costs and expenses.

Class Counsel claim that the Agreement's provision that the Seven Law Firms will seek "no other payment from Class Counsel for attorneys' fees, costs and expenses" supports their view that the Agreement provided only for the payment of a flat $600,000. But that argument is a non-sequitur. The prohibition on seeking more than the amount provided in the Agreement is as consistent with the interpretation that Class Counsel were obligated to pay "$600,000.00 plus expenses" as it is with Class Counsel's contention that they only owed a flat $600,000.00.

2. Class Counsel's Contention that the Agreement is "Nonsensical" Is Without Merit

Class Counsel contend that the Seven Law Firms' interpretation of the Agreement is "nonsensical" because it would obligate Class Counsel to pay an "unknown" amount of expenses over and above the $600,000.00 in fees. That argument is wrong for three reasons:

- First, the amount of expenses *was not* unknown. As Mr. Plutzik's unrebutted testimony attests, Mr. Strange asked Mr. Plutzik for an estimate of the Seven Law Firms' expenses, and Mr. Plutzik supplied one, *before* any agreement was reached. Plutzik Decl., ¶ 19 ("Mr. Strange requested an estimate of the Seven Law Firms' expenses and I provided one.")[5] Class Counsel

[5] At ¶ 3 of his Declaration, Mr. Strange states that the Seven Law Firms didn't provide an *itemization* of their expenses before the Agreement was signed. However, he admits that he and Mr. Plutzik *discussed* expenses, and he does not dispute Mr. Plutzik's testimony (1) that he received an *estimate* of the Seven Law Firms' expenses, and (2) that Mr. Plutzik described a major element of the expenses, the $82,621.30 in Court-ordered class notice expenses costs that the Seven Law Firms had incurred. Plutzik Decl., ¶ 19 ("I mentioned that because the Court in the California Litigation had certified a litigation class and had ordered notice to be disseminated to the classes at plaintiffs' counsel's expense, we had been forced to incur $82,621.30 in notice costs that was still owed to Gilardi & Co. I asserted that if the Seven Law Firms were not reimbursed separately for our expenses, we would be put in the position of having to pay out-of-pocket for the California notice, which would be an unfair and intolerable outcome.")

thus knew that "$600,000.00 in attorneys' fees, plus costs and expenses" meant approximately $800,000.00. Class Counsel knew what they were getting into, and they agreed to it willingly.

- Second, the Agreement says what it says. The Court cannot rewrite it even if it concludes Class Counsel made a deal that was unwise for them – an unlikely conclusion, given that they received more than 80% of the fees, while the Seven Law Firms received only 10% of the fees and less than 30% of their lodestar.

- Third, the Seven Law Firms' expenses don't reduce Class Counsel's share of the money by even one cent. The Court authorized the reimbursement of plaintiffs' counsel's expenses *in addition to* paying them $6,000,000.00 in attorneys' fees. Whatever expenses go to the Seven Law Firms therefore come from *the class's* recovery. It wasn't "nonsensical" for Class Counsel to allow law firms that incurred expenses to be reimbursed separately for them – especially since Class Counsel knew before they signed the Agreement how much those expenses would be. Indeed, it would have been "nonsensical" for *the Seven Law Firms* to enter into an Agreement that *did not* reimburse them separately for their expenses, including the Court-ordered expenses of class notice. That is why the Seven Law Firms refused to enter into, or even to *consider*, such an agreement, and insisted that they be reimbursed for their expenses *in addition to* the agreed-on $600,000.00 in attorneys' fees. Plutzik Decl., ¶ 19 ("Accordingly, I told Mr. Strange that the Seven Law Firms would not agree to, and would not even consider, any offer that did not include full reimbursement of our costs and expenses on top of any fees.")

Class Counsel also contend that the Agreement, as interpreted by the Seven Law Firms, "makes no sense" because it would require Class Counsel to pay $600,000.00 plus expenses "irrespective of what the Court awarded." However, this Argument is bogus. Even as *Class Counsel* construe it, the Agreement would entitle the Seven Law Firms to the same sum of money "irrespective of what the Court awarded." Class Counsel were willing to take that risk, because the amount of fees they were guaranteeing to the Seven Law Firms was only 10% of the whole. Class Counsel knew as well that the Court in *Milliron*, employing the percentage-of-the-recovery approach, had awarded a fee equal to 1/3 of the cash and non-cash benefits that the settlement conferred. The $6,000,000 in fees sought here was precisely 1/3 of the recovery in *Hall*. The risk that the Court would approach fees differently in this case was minimal.[6]

B. Extrinsic Evidence Confirms that Class Counsel Owe the Seven Law Firms an Additional $199,691.01

Unrebutted extrinsic evidence confirms that the Agreement gave the Seven Law Firms attorneys' fees of $600,000.00, *plus* the costs and expenses that they had incurred.

1. The Language and Circumstances of Class Counsel's Own Fee Application and Award Establishes that the Agreement Entitles the Seven Law Firms to Expenses on Top of Their Fees

First, as demonstrated in the opening papers on this motion, both Class Counsel and the Court interpreted virtually identical language in the Settlement Agreement, the Notice and Class Counsel's fee application to allow *Class Counsel* to recover attorneys' fees in a fixed amount *plus* expenses on top of those fees. Thus:

- The Settlement Agreement, Article VI, § 3, at pp. 25-26, stated: "Class Counsel may make a Fee and cost Application … seeking an award of reasonable attorneys' fees in an amount not to exceed 33 1/3% of $18,000,000 or $6,000,000 *and reimbursement of expenses*."

- The Class Notice said: "The Court will consider if … [*a*]*ttorneys' fees up to $6,000,000, plus reimbursement of reasonable expenses, should be awarded*…."

- The Class Notice added: "Class Counsel have agreed not to seek more than *$6,000,000 in fees plus reimbursement of expenses*."

- Class Counsel's fee application asked for "*$6 million, plus reimbursement of expenses* …" Docket 522, at p. 2.

[6] Class Counsel's related argument that the Seven Law Firms' interpretation of the Agreement would have obligated Class Counsel to pay the Seven Law Firms' $199,691.01 of claimed expenses even if the Court disallowed them is also wrong. If the Court had disallowed the Seven Law Firms' claimed expenses, Class Counsel would not have had to pay them. In any event, Class Counsel were in a position to know whether the Seven Law Firms' claimed expenses were genuine or not. Not only had they received an estimate of those expenses before they signed the Agreement but Mr. Strange was a nonvoting member of the California ETF Executive Committee who could evaluate the reasonableness of the Seven Law Firms' claimed expenses.

- The Court's Opinion, Docket No. 584, at 29, stated: "Class Counsel also moves for an award of attorneys' fees in the amount of thirty-three and one-third (33 1/3) percent of the Class benefit *plus reimbursement of expenses* in the amount of $506,943.75."

The Court awarded Class Counsel $6,000,000 in attorneys' fees, ***plus*** expenses of $506,943.75. It is clear that both Class Counsel and the Court interpreted the phrase "fees plus [or "and"] reimbursement of expenses" to mean that expenses were payable on top of, and in addition to, fees.

Class Counsel ***do not respond at all*** with respect to the language of the Settlement Agreement, their own fee application, the Court's Opinion or the first of the two references to the Notice noted above. They have therefore conceded that the language of those four excerpts is essentially the same as the language of the Agreement, and should be construed in the same way.

Class Counsel argue only that the language in the Notice that "Class Counsel have agreed not to seek more than $6,000,000 in fees plus reimbursement of expenses" is different from the corresponding language of the Agreement, and must be interpreted differently, because it uses the phrase, "$6,000,000 ***in*** fees plus reimbursement of expenses," while the Agreement employs the language "$600,000.00 … ***for*** attorneys' fees, plus reimbursement of costs and expenses." We submit, however, that there is no difference between "***in***" and "***for***" in this context. Moreover, no such argument is possible with respect to the other four excerpts on which the Seven Law firms rely – and none is asserted. None of them use the word, "in."

2. The Undisputed Evidence of the Negotiations that Led to the Agreement Compels the Conclusion that the Seven Law Firms Are Entitled to $600,000 Plus Expenses

The evidence of the negotiations that led to the Agreement also compels the conclusion that the Seven Law Firms are entitled to $600,000,00 in attorneys' fees, ***plus*** reimbursement of the $199,691.01 they incurred in litigating claims released in the Settlement. As is shown in the Plutzik Declaration, the two lawyers who negotiated the Agreement, Brian Strange and Alan Plutzik, extensively discussed whether the Seven Law Firms should receive a flat sum of money or a flat fee *plus expenses on top*, and agreed orally that Class Counsel would pay the Seven Law Firms "***$600,000.00 plus expenses***." Plutzik Decl., ¶ 19. That oral agreement is enforceable in and of itself. Moreover, the written Agreement conforms to it and embodies it. Class Counsel do not in any way rebut Mr. Plutzik's testimony in that regard.

3. Class Counsel Themselves, When It Served Their Purposes, Argued that the $600,000.00 in the Agreement Comprised Fees Alone and Did Not Include Costs and Expenses

Class Counsel have also failed to rebut the evidence that they have taken inconsistent positions regarding the meaning of the Agreement. When it served their interests to do so, Class Counsel argued that the $600,000.00 referenced in the Agreement constituted *fees alone,* ***not*** fees, costs and expenses. Thus, Mr. Strange asked the Seven Law Firms to contribute 10% of the cost of buying out an objector because the $600,000 they received comprised 10% of the $6,000,000 in fees that the Court had awarded. Plutzik Decl., Exh. I ("I therefore agreed we would collect[ive]ly pay [the objector] $150,000 to go away provided we get the full fee. ***Your percentage share is $15,000 which is 10% of the amount which is your percentage of the total fee if we get it."***) Mr. Strange's email is an admission that the $600,000 constituted *only* fees, and that no portion of it was expenses. Class Counsel are estopped to claim otherwise.[7]

4. A Comparison with the Bursor Agreement Shows that Class Counsel Owe the Seven Law Firms Expenses on Top of their $600,000.00 in Fees

Unrebutted evidence also proves that Class Counsel knew how to write an agreement providing for the payment of a flat amount that was inclusive of fees and expenses – and that they did not do so here. Their contract with Scott Bursor stated that Mr. Bursor would receive "***the total sum of $400,000 (Four Hundred Thousand dollars)***" in full payment for his work on the California AT&T ETF Claims. Plutzik Decl., ¶ 17 & Exh. A. That agreement *lacked* the

[7] *Long Beach v. Mansell*, 3 Cal.3d 462, 488 (1970) (Government estopped to assert that it owned property by its prior approval of development of the same property by private owners); *Chem. Leaman Tank Lines,Inc. v. Aetna Cas. & Sur Co.*, 89 F.3d 976, 992 (3d Cir. 1996) (Insurance company estopped to take advantage of its lie to regulators to take advantage of insureds.)

"plus reimbursement of costs and expenses" language that was in the Agreement with the Seven Law Firms. Instead, it used the expression "… the total sum of $400,000…"[8]

5. Class Counsel's Testimony About their Subjective Purpose In Entering Into the Agreement is Irrelevant

Class Counsel argue that their purpose in entering into the Agreement was to liquidate the amount to be paid to the Seven Law Firms into a lump sum and to avoid disputes, and that they would never have agreed to pay the Seven Law Firms a fee plus an "unknown" amount of expenses. As we have shown, the expenses were not "unknown." Furthermore, Class Counsel's post-hoc characterization of why they signed the agreement is entitled to no evidentiary weight, and is not even admissible, because it is not in the Agreement. The law is clear: The Court's task is to ascertain the intention of the parties *as revealed by the language of the contract itself.* Under the "objective theory of contracts," a party's subjective intentions or understandings that are unexpressed in the language of the contract are irrelevant.[9] Furthermore, Class Counsel's interpretation of the Agreement doesn't "avoid disputes" any more or less than the Seven Law firms' construction of the Agreement. A dispute is inevitable when one side refuses to perform. That is what has happened here. The parties signed an Agreement that clearly set forth the rights and duties of both sides. It was Class Counsel's decision to precipitate a dispute by advocating an interpretation of the Agreement that is at odds with its plain language.

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[8] In contrast, while Mr. Strange's draft said that the Seven Law Firms would receive "the ***total*** sum of $600,000,00 (Six Hundred Thousand Dollars) in attorneys' fees, plus … costs and expenses …," the word "total" was removed before the Agreement was signed. Plutzik Decl., ¶¶ 22-23 & Exh. C. Even if the word "total" had stayed in, the Agreement would still entitle the Seven Law Firms to fees of $600,000, plus expenses. However, its exclusion makes it even clearer that $600,000 is not the "total" amount to which the Seven Law Firms are entitled.

[9] *See Blumenfeld v. R.H. Macy & Co.*, 92 Cal.App.3d 38, 46 (Extrinsic evidence supporting a construction to which a contract is not reasonably susceptible is inadmissible. "A party is bound, even if he misunderstood the terms of a contract and actually had a different, undisclosed intention."); *Beard v. Goodrich*, 110 CA4th 1031, 1037-1040 ("Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone. Contract formation is governed by objective manifestations, not the subjective intent of any individual …") (citations omitted.); *Dome Petro. Ltd. v. Employers Mut. Liability Ins. Co.*, 767 F.2d 43, 47 (3d Cir. 1985); ("Under New Jersey contract law, the object of interpretation is not the discovery of undisclosed subjective intent. Rather, the courts look to the objective intent manifested in the language of the contract in light of the circumstances surrounding the transaction.") (citation omitted).

6. Class Counsel Misinterpret the Email Refusing to Bear Any Portion of the Cost of Buying Out an Objector

Class Counsel argue that Alan Plutzik conceded in an email to Brian Strange that the Seven Law Firms were entitled to nothing more than the flat sum of $600,000.00. However, Class Counsel misinterpret that email and take it out of context. Mr. Plutzik's email was in response to an email from Mr. Strange – discussed at pages 9-10 – in which Mr. Strange said, in essence, that since the Seven Law Firms, under the Agreement, would receive 10% of the fees, they should pay 10% of the cost of buying out an objector. Mr. Plutzik refused, stating:

> The agreement provides for the payment of a flat sum to the seven law firms included in my group, not a percentage. As I read the agreement, it doesn't contemplate that the members of my group will be obligated to fund any portion of the settlements Class Counsel may reach with other plaintiffs' counsel.

Class Counsel argue that when Mr. Plutzik said that "the agreement provides for the payment of a flat sum to the seven law firms," he meant the Seven Law Firms were only entitled to a flat $600,000.00 that included expenses as well as fees. But that is a misinterpretation. Mr. Strange was asking the Seven Law firms to reduce their *fees* to contribute to the buyout. Mr. Plutzik's response was that the Seven Law Firms' fees were fixed and not subject to reduction by the costs of buying out other counsel. The subject of Mr. Plutzik's response was *fees*. So, when he said that "the agreement provides for the payment of a flat sum to the seven law firms," he meant "a flat sum" ***for fees.*** The rest of Mr. Plutzik's first sentence proves that – he says: "The agreement provides for the payment of a flat sum to the seven law firms included in my group, "***not a percentage.***" Mr. Strange was suggesting that since the Seven Law Firms were entitled to 10% of the fees, they should pay 10% of any buyout. Mr. Plutzik's response was "We're entitled to a flat fee, not a percentage." The email exchange wasn't about costs and expenses.

III. CONCLUSION

For the foregoing reasons, the Court should enforce the Agreement; rule that the Seven Law Firms are entitled to receive an additional $199,691.01 from Class Counsel; and order Class Counsel to pay that amount to the Seven Law Firms without delay.

Dated: January 31, 2011

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